

In the Matter of the Appeal of)
HOWARD D. WEBB)

Appearances:

For Appellant: William D. Easton
Attorney at Law

For Respondent: John D. Schell
Counsel

O P . I N . I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Howard D. Webb against a proposed assessment of additional personal income tax in the amount of \$122.12 for the year 1968.

The question presented is whether certain life insurance premiums paid by appellant pursuant to a divorce decree are deductible by him as alimony. (Rev. & Tax. Code, § 17263.)

On May 16, 1968, appellant and his wife Yvonne, both residents of Long Beach, California, were granted an interlocutory decree of divorce. The divorce became final on August 12, 1968. The judgment of divorce obligated appellant to pay alimony commencing April 15, 1968, but that obligation would terminate upon Yvonne's death or remarriage or upon appellant's death. The judgment further provided as follows:

Defendant [appellant herein] is ordered, so long as plaintiff is entitled to... alimony..., to maintain \$50,000 life insurance on his life. Defendant is ordered to maintain said policy or policies in full force

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and effect, pay the premiums as they become due, keep said policy or policies at all times unencumbered and keep plaintiff as beneficiary thereon, so long as plaintiff is entitled to alimony.

Apparently in anticipation of this part of the decree, appellant and Yvonne applied to the Crown Life Insurance Company of Toronto, Canada, for a 19-year level term life insurance policy with a face amount of \$50,000. The application was dated April 25, 1968, and Yvonne signed it as the owner of the proposed policy. Appellant signed the application as the proposed insured., thereby consenting to the issuance of the policy and declaring that Yvonne was to be the owner of all benefits and rights conferred by the policy.

Subsequently, Crown Life Insurance Company issued the requested policy. The effective date of the policy was June 1, 1968, and Yvonne was designated as both owner and beneficiary. During 1968 appellant paid premiums, on the policy in the amount of \$1,230.90, and he included that sum in the alimony he deducted on his personal income tax return for 1968. Respondent determined that the premiums did not constitute deductible alimony, and appellant has appealed from respondent's denial of his protest against that determination.

Revenue and Taxation Code section 17263 allows a husband who is divorced or separated from his wife to deduct periodic support payments that are includible in the wife's gross income pursuant to Revenue and Taxation Code section 17081. Thus, the husband's right to a deduction depends upon the wife's duty to include the payments in her gross income. We turn, then, to section 17081 in order to determine whether Yvonne was required by its provisions to include her former husband's premium payments in her gross income for 1968.

The applicable provision of section 17081 is contained in subdivision (a), which states, in pertinent part:

If a wife is divorced.. .from her husband under a decree of divorce.. ., the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of . . . a legal obligation which, because of the

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marital or family relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce....

Since subdivision (a) is based on an identical section of federal law (Internal Revenue Code, section 71(a)), federal court decisions interpreting the federal statute are entitled to great weight in construing the state statute. (Meanley v. McColgan, 49 Cal. App. 2d 203 [121 P.2d 453; Appeals of Mary Frances Saver, Cal. St. Bd. of Equal., Oct. 27, 1971.]

Appellant contends that the federal cases uniformly hold that premium payments made by a divorced husband are includible in the wife's gross income and deductible by him when the wife is the owner of the insurance policy. (See, e.g., Anita Quinby Stewart, 9 T.C. 195; Katharine T. Hvyee, 36 T.C. 507, aff'd, 301 F.2d 279.) Respondent contends that the taxability of the premiums to Yvonne depends upon whether the decree required her to be -made the owner of the policy. If it did not, then appellant's voluntary and gratuitous transfer of full ownership rights to her would not make his premium payments income to her or deductible by him. (Florence H. Griffith, 35 TX. 882.)

We note first that the decree of divorce between appellant and Yvonne did not require that Yvonne be the owner of the insurance that appellant was required to maintain for her protection during the alimony period. Appellant could have fully satisfied his insurance obligation by procuring a policy, in the required amount, that named Yvonne as beneficiary and appellant as owner. Thus, in consenting to the issuance of a policy naming Yvonne as both owner and beneficiary, and paying the premiums thereon, appellant clearly-did more than he was legally obliged to do by the decree. The question remains whether this is fatal to his claimed deduction. Although there is some doubt about the matter, we believe that the deduction was properly disallowed..

The doubt arises from the fact that the federal appellate courts have never stated explicitly that the decree, or written instrument incident thereto, must require that the wife be the owner of the policy. =/

1/ It must be said, however, that in all of the reported federal cases allowing the husband a deduction for premium payments, the decree or written instrument did in fact specify that the wife was to own the policy.

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Moreover, the Commissioner of Internal Revenue has taken inconsistent positions on the issue in litigated cases. (Compare Florence H. Griffith, supra, 35 T.C. 882, and Turpin v. United States, 240 F. Supp. 171, with Lois A. Cole, T.C. Memo., April 15, 1971.) The Commissioner's latest ruling in this area, Rev. Rul. 70-218, 1970-1 Cum. Bull. 19, does not clearly resolve the matter one way or the other. Faced with the necessity of deciding the question here and now, we believe we should follow the available authority contained in the Tax Court holdings in Griffith and Cole. In both cases the wife, despite being the complete owner of the insurance policy, was held not to be taxable on premium payments made by her former husband, where neither the divorce decree nor a written instrument incident to it required that the wife have ownership of the policy. The theory of Cole, which we adopt for the purposes of this appeal, is that premium payments on a policy voluntarily transferred by the husband to the wife are not alimony since they are not made "in discharge of a legal obligation" within the meaning of section 17081, subdivision (a). Since appellant's premium payments in 1968 were made under such circumstances, they did not constitute alimony and were not deductible.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuantto section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Howard D. Webb against a proposed assessment of additional personal income tax in the amount of \$122.12 for the year 1968, be and the same is hereby sustained.

Done at Sacramento, California, this 31st day of July , 1972, by the State Board of Equalization.

_____, Chairman

_____, Member

Paul G. Hertz, Member

Scott K. Hertz, Member

William W. Hertz, Member

ATTEST:

W. W. Hertz, Secretary